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No. 89, Original

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA, EX REL.,
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON CROSS-MOTIONS FOR JUDGMENT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the State or the United States today owns former submerged seabed and tidelands off the open seacoast which, long before the Submerged Lands Act of 1953, became uplands attached to federal littoral lands by accretion indirectly attributable to artificial causes.

TABLE OF CONTENTS

	Page
Jurisdiction	1
Statement	1
Argument:	
Introduction and summary	5
A. The former submerged land	6
B. The former tidelands	20
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Alabama v. *Texas*, 347 U.S. 272 9
Bonelli Cattle Co. v. *Arizona*, 414 U.S. 313 .....11, 14-15
Borax Ltd. v. *Los Angeles*, 296 U.S. 10 ..... 11, 21
County of St. Clair v. *Lovingston*, 90 U.S. (23 Wall.) 46 .....11-12, 14
Hughes v. *Washington*, 389 U.S. 290..10, 11, 16, 20, 21, 24
Louisiana Boundary Case, 394 U.S. 11 ..... 14, 18
New Orleans v. *United States*, 35 U.S. (10 Pet.) 662 12
Oregon Ex rel. State Land Board v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 .....7, 8, 11, 12, 15, 21, 23
Pollard's Lessee v. *Hagan*, 44 U.S. (3 How.) 212..6, 8, 11, 12, 21, 22
Shively v. *Bowlby*, 152 U.S. 1 ..... 11, 21
Texas Boundary Case, 394 U.S. 1 9
United States v. *California*, 332 U.S. 19 .....4, 8, 15, 20
United States v. *California*, 332 U.S. 804 ..... 22, 23
United States v. *California:*
381 U.S. 139 ..... 9, 14
382 U.S. 448 18
432 U.S.C. 40 18
United States v. *California*, 436 U.S. 32 10
United States v. *California*, 447 U.S. 1 18

Cases—Continued Page

United States v. *Louisiana*, 339 U.S. 699 8
United States v. *Louisiana*, 340 U.S. 899 ..... 22, 23
United States v. *Louisiana*, 363 U.S. 1 8-9
United States v. *Louisiana*, 389 U.S. 155 9
United States v. *Louisiana*, 446 U.S. 253 9
United States v. *Maine*, 420 U.S. 515 9
United States v. *Texas*, 339 U.S. 707 .....8, 10, 22
United States v. *Texas*, 340 U.S. 900 ..... 22, 23
Wilson v. *Omaha Indian Tribe*, 442 U.S. 653 .....20, 23-24

Constitution, and statutes:

United States Constitution, Article IV (Property Clause) 9, 10
Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* 9
Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.* 6
43 U.S.C. 1301(a) 12
43 U.S.C. 1301(a)(1) 12, 14
43 U.S.C. 1301(a)(2) 13, 14, 23
43 U.S.C. 1301(a)(3) 13
43 U.S.C. 1301(c) 14
43 U.S.C. 1311(a) 23
43 U.S.C. 1313 10
43 U.S.C. 1313(a) 16

Miscellaneous:

42 Op. Att'y Gen. 241 (1963) 13, 15, 17

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JURISDICTION

The original jurisdiction of this Court is properly invoked under Article III, Section 2, of the Constitution, 28 U.S.C. 1251(b) and 28 U.S.C. 1346(f), as construed in *California* v. *Arizona*, 440 U.S. 59, 65-68 (1979). The sovereign immunity of the United States has been waived by 28 U.S.C. 2409a(a). 440 U.S. at 63-65. By Order of October 5, 1981, the Court has granted the State of California leave to file the Bill of Complaint.

STATEMENT

The State of California filed its original Bill of Complaint on July 7, 1981, together with a motion for leave to file. Pursuant to the Court's Order of October 5, 1981, the United States filed its Answer

on November 2, 1981, admitting the factual allegations of the Complaint, denying that the State is entitled to the relief sought, and praying for judgment quieting federal title to the acreage in dispute. In accordance with Orders entered November 30 and December 7, 1981, the case is before the Court on the cross-motions of the parties, a Motion for Judgment on the Pleadings filed by the United States on November 2, 1981, and a Motion for Summary Judgment filed by California on November 17, 1981.

1. California claims as "sovereign lands" some 184 acres bordering the Pacific Ocean north of the channel entrance to Humboldt Bay in the northern part of the State. See Exhibit B to the Complaint. The United States, on the other hand, asserts that the disputed acreage is federal land, part of a Coast Guard Reservation comprising the southern portion of the North Spit (or Samoa Peninsula) sheltering the Bay. Today, all the area at issue is upland, lying shoreward of the high water line.

As the pleadings disclose, the relevant facts are not disputed. We have previously summarized the essential history of the contested acreage, as follows:

> (a) At the time of California's admission to the Union in 1850, and for half a century thereafter, most of the lands now claimed were permanently submerged below the Pacific Ocean and some small part of them were tidelands—uncovered at low tide and submerged at high tide—adjacent to ocean-fronting uplands owned by the United States;
>
> (b) Some years after California statehood, the United States withdrew the adjacent uplands from the public domain to create a Coast Guard Reservation, whose boundary on the Pacific Ocean was the line of mean high water;

(c) As a result of the construction by the United States of jetties at the turn of the century, fairly rapid accretion occurred on the ocean side of the Coast Guard Reservation, so that the former submerged lands and tidelands in suit became uplands, the process being complete well before 1953;

(d) But for the construction, improvement and maintenance of the jetties, the lands in suit would have remained submerged or tidelands, approximately as they were in 1850 and for the next half century.

In our view, it would serve no useful purpose to elaborate these facts. We have no objection, however, to the Court's taking judicial notice of the supporting Exhibits tendered by California with its Complaint, which detail and illustrate the geographical changes. Exhibits A, C and D.[1] We stress only two points. First, although the accretion would not have occurred except for the construction of the jetties, the land in dispute was formed by natural wave and tidal action accumulating sand against the shore and the northern jetty, not by an artificial land fill, drainage or other deliberate human activity. Second, the process of accretion, albeit "fairly rapid," consumed several years and was effected little by little.

2. The present controversy grew out of a proposal by the Coast Guard to construct and install a watchtower on the disputed land. In December 1977, the Commander of the local Coast Guard District applied to the California Lands Commission for a permit to

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[1] Nor, indeed, do we object to the Court's noticing the other documents submitted by the State in the same volume, albeit their relevance is denied.

that end. Exhibit E. We need not explore whether this was done on the mistaken view that the site was State property or merely to avoid controversy. At all events, the proposed permit document forwarded by the State in May 1978 (Exhibit F) expressly disclaimed any admission by either party whether the affected land was owned by the State or the United States. *Ibid*, Proposed Permit, at 3, § 2, para. 1. A few days later, the Bureau of Land Management of the Department of the Interior formally advised the Coast Guard and the California Commission that the United States claimed the disputed acreage as accretion. Letter of June 5, 1978, attached to Exhibit G. In further correspondence, the parties adhered to their respective positions (Exhibits G and H), and the proposed permit was never executed.

3. In its Complaint, California alleges no estoppel against the United States.[2] Rather, it claims the acreage as formerly submerged lands and tidelands, characterized "sovereign lands," as to which "California became vested with absolute title * * * free of any federal claim of title or federal principle of land title" "[u]pon its admission to the Union * * * or as confirmed by virtue of the Submerged Lands Act." Complaint, paras. 4 and 5, Motion at 28. The prayer is that the State's title be quieted and that the United States be compelled to execute a quitclaim deed in favor of the State. Complaint Prayer, paras. 1 and 2, Motion at 30.

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[2] Such a contention would, of course, be frivolous. See *United States* v. *California*, 332 U.S. 19, 39-40 (1947).

ARGUMENT

Introduction And Summary

The lands at issue are today all upland, above the line of mean high water. They constitute accretion to reserved lands of the United States, and result from natural forces, albeit deflected by artificial works. For the most part, the area in question was, in 1850, completely submerged below the Pacific Ocean. A small strip, of undefined dimensions, was then tidelands—uncovered at low tide but submerged at high tide. Although California, thus far, has not differentiated the basis of its claim to each portion of the disputed parcel, we deem it appropriate to deal separately with the former submerged lands and the former tidelands.

Preliminarily, however, we stress one common point. The controversy here is between a state and the Nation. Accordingly, the question is not how the State may fashion its property law to govern its own citizens. Ultimately, the issue is whether the area in dispute, claimed by the United States, ever was, or is today, subject to disposition in accordance with state law rules.

1. With respect to the lion's share of the area in dispute—the former submerged lands—our basic submission is simple. No part of the marginal seabed was conveyed to the State under the Equal Footing Doctrine and California can claim title to such lands only under the Submerged Lands Act of 1953. That grant, however, embraced only the bed of the marginal sea as geographical reality then defined it, in accordance with uniform federal statutory standards. Since the area in dispute had long ceased to be submerged in 1953, it was unaffected by the Act. Having become attached to lands of the United States,

the former seabed area has at all times remained part of the federal domain and State law property rules accordingly cannot control.

2. Assuming that tidelands along an open seacoast are governed by the *Pollard* rule (*Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845))—a question not wholly settled—it grants only what the Submerged Lands Act confirmed: an ambulatory title, shifting with geographical changes. On the open sea, any other principle would produce inequitable and unworkable results. At all events, when the United States is the owner of the land on both sides of a strip of former tidelands, the uniform federal rule, embodied in statute, should be followed, and the consequence is that artificially caused accretion inures to the upland owner, the United States.

A. The Former Submerged Land

Most of the acreage in dispute was permanently submerged when California entered the Union in 1850, and lay well within the outer political boundaries of the State. But, being part of the bed of the Pacific Ocean off an open coast, that land plainly did not underly State "inland" or "internal" waters, as those terms are understood in national and international law. Long before the passage of the Submerged Lands Act (43 U.S.C. 1301 *et seq.*) in 1953, moreover, the formerly submerged acreage had, by a more or less gradual process of accretion ultimately attributable to artificial causes, become permanent upland, attached to coastal lands of the United States, retained by the national sovereign in the California Enabling Act and later set aside as a Coast Guard Reservation. On these facts, we submit, California can claim no title to the formerly submerged acreage.

The State's contention, as we understand it, rests on two premises: (a) that the offshore acreage was, at one time, "sovereign land" of California; and (b) that State law controls the question whether such sovereign land remains State property or inures to the adjacent upland owner—whether the United States or a private proprietor—when it ceases to be submerged due to "artificial" accretion. In our view, both propositions are wrong. But, since each is essential to the conclusion, it is enough for present purposes if we fault the major premise.

Even California does not suggest that it acquired title to the formerly submerged lands in dispute under some self-serving rule of State law. There are only two possible sources for California's claim: the Equal Footing Doctrine or the Submerged Lands Act. We consider them in that order.

1. Whatever else is arguable, it has never been suggested that the Equal Footing Doctrine, insofar as it vests in the states, upon their admission to the Union, the beds and banks of navigable waters, has a different effect in each state, depending on its laws. Since the rule is one of federal constitutional law, and one mandating equality of treatment, it obviously must have a uniform meaning in all the states. Of course, each state may at any time renounce any portion of the constitutional grant. But no state is free to *expand* its original scope by adopting a more generous definition of "navigable water," or "inland water," or "bed" or "bank." At least the original boundaries of the "equal footing" grant are fixed by uniform federal rule. So much, indeed, seems firmly established (if it was ever doubted) by *Oregon Ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 376 (1977); *id.* at 385 (Marshall, J., dissenting).

It follows that California, like all other states, acquired at statehood only such "sovereign" submerged lands as are embraced by the Equal Footing Doctrine elaborated in *Pollard's Lessee* v. *Hagan*, *supra*, [illegible] and its progeny. And it is long settled —as it happens, first in a case involving California—that only "inland" water bottoms are included, specifically not the seabed below the line of low water off an open coast. *United States* v. *California*, 332 U.S. 19 (1947). See, also, *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). Thus, unless the federal rule has been altered, California never acquired the formerly submerged lands in suit.

2. It is presumably suggested that such a change of law occurred with the passage of the Submerged Lands Act in 1953. The short answer is that the statute came too late to affect the former seabed acreage in dispute, which, long before 1953, had become upland and thus beyond the reach of the Submerged Lands Act. That is the end of the matter unless it can be demonstrated that Congress retroactively "overruled" this Court's first *California* decision limiting the *Pollard* rule to lands underlying inland waters, or otherwise granted the coastal States title to formerly submerged seabed.

a. Since the Court's holding in the first *California* case, followed in the first *Louisiana* and *Texas* cases, resolved a question of federal *constitutional* law—the scope of the Equal Footing Doctrine—Congress could not overrule it if it chose. At all events, the Court has explicitly held that the 1953 statute "did not impair the validity of the [pre-Submerged Lands Act] *California*, *Louisiana*, and *Texas* cases," but was a "constitutional exercise of Congress' power to dispose of federal property." *United States* v. *Louisi-*

ana, 363 U.S. 1, 7, 20 (1960). See also, *id* at 86 (Black, J., dissenting); *Alabama* v. *Texas*, 347 U.S. 272, 273-274 (1954); *id.* at 275-277 (Reed, J., concurring); *United States* v. *Louisiana* (Texas boundaries), 389 U.S. 155, 156-157 (1967); *Texas Boundary Case*, 394 U.S. 1, 2 (1969); *United States* v. *Maine*, 420 U.S. 515, 524-526 (1975); *United States* v. *Louisiana*, 446 U.S. 253, 256, 268 (1980). Nor has the Court itself changed its view. See *United States* v. *Maine*, *supra*.

b. What is more, attributing any different objective to the Submerged Lands Act would raise additional constitutional problems. The statute was sustained as a disposition of *federal* property, a matter over which Congress has plenary power under Article IV. But if this Court's holding that the territorial seabed did not inure to the States were deemed reversed retrospectively, it would be most difficult to defend critical provisions of the Act, and its corrollary, the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* Presumably, Congress cannot withhold any part of what the Constitution itself granted to the states. Yet, the Submerged Lands Act purports to limit the states' share of the seabed to three miles from present coastlines along the Atlantic and Pacific Oceans, regardless of historic boundaries (*United States* v. *California*, 381 U.S. 139, 159-160, 163-167, 174, 176-177 (1965); *United States* v. *Maine*, *supra*, 420 U.S. at 519-527), and to a maximum of three leagues from modern coastlines in the Gulf of Mexico, even when, due to erosion, the historic boundary was more seaward (*Texas Boundary Case*, *supra*, 394 U.S. at 4-6). In every case, moreover, the statute exempts from the grant—without compensation—any area otherwise within the state's territorial seabed effectively appropriated by

the United States at any time before 1953. 43 U.S.C. 1313; see *United States* v. *California*, 436 U.S. 32, 38-41 (1978).

So, also, if the Submerged Lands Act were viewed as merely implementing a grant already made by the Constitution itself, it seems doubtful that the Equal Footing principle would condone a scheme under which Gulf States alone were free to establish "historic" claims up to nine miles while the same privilege was denied to the states bordering the Atlantic or the Pacific. See *United States* v. *Texas*, *supra*, 339 U.S. at 717-720.

3. To be sure, although it could not rewrite the Equal Footing Doctrine, Congress might have achieved much the same result by exercising its powers under the Property Clause. Thus, insofar as uplands then in federal ownership were concerned,[3] Congress might have determined to cede them to the states where the acreage in question had, at statehood, formed part of the seabed within three miles of the historic shoreline. Or, conceivably, Congress might have made such a contingent grant, affording each state the opportunity, if it chose, to accept the offer by fashioning its rules of accretion and reliction accordingly. But there is not the slightest basis for attributing any such extraordinary objective to the Submerged Lands Act.

a. No doubt, within constitutional limits and subject to exceptions enacted as a matter of policy, the

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[3] Obviously, the Property Clause did not authorize Congress to convey to the states accretions then in private ownership. Nor could Congress, any more than the states, accomplish that result without payment of just compensation. See *Hughes* v. *Washington*, 389 U.S. 290, 294-298 (1967) (Stewart, J., concurring).

Congress of 1953 was intent on "confirming" an earlier understanding that the *Pollard* rule applied to the territorial sea, notwithstanding this Court's contrary decisions. But it does not follow that the states were now to regain lands long since emerged from the seabed and now part of the mainland. That is simply not what the *Pollard* rule was then believed to mean.

The fact is that, until *Oregon Ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, was decided in 1977, the prevailing doctrine was that *Pollard* recognized state title to lands underlying navigable waters—as well as shores and banks—subject to the vagaries of accretion, reliction and erosion. Only when a sudden "avulsive" change occurred, whether induced by artificial or natural causes, was the legal status quo ante preserved. Otherwise, the state's "sovereign" title to navigable water bottoms expanded or contracted as the boundaries of the water body gradually shifted over time, regardless whether the indirect cause could be traced to man-made works. Nor was it supposed that any state could, by enacting special rules, defeat the principle of ambulatory navigable water boundaries. There was assumed to be a uniform federal—indeed, constitutional—law governing accretion, reliction, erosion and avulsion, which defined state sovereign title within navigable waters. Of course, any state was deemed free to relinquish any part of what the Equal Footing Doctrine secured, but it could not expand the scope of the grant. See *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 318-321, 322-327 (1973). See, also, *Hughes* v. *Washington*, 389 U.S. 290, 293 (1967); *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 22 (1935); *Shively* v. *Bowlby*, 152 U.S. 1, 35 (1894); *County of St. Clair* v. *Loving-*

ston, 90 U.S. (23 Wall.) 46, 68 (1874); *New Orleans* v. *United States*, 35 U.S. (10 Pet.) 662, 717 (1836).

However erroneous this view in light of *Corvallis*, there is no reason to doubt that the Members of Congress, like the Members of this Court, so understood the *Pollard* rule in 1953. Presumably, Congress would have legislated accordingly had it believed *Pollard*, as applied both to navigable inland waters and the marginal sea, vested an indefeasible title to all lands submerged at statehood, regardless of any later geographical changes. But, at this late date, it would be quite wrong to construe the Submerged Lands Act as implementing a view of the *Pollard* doctrine only accepted in this Court more than two decades after Congress acted.

b. At all events, whether or not Congress was attempting to tailor its grant to the *Pollard* rule, as then understood, it is plain that the Submerged Lands Act actually accomplishes an ambulatory conveyance, reflecting current geographical reality and not reconstructed historical boundaries. We need look no further than the definition of "lands beneath navigable waters" incorporated in the Act. 43 U.S.C. 1301 (a).

That term, so far as applicable to the beds and banks of nontidal waters, is expressly restricted to lands "which *are* covered by nontidal waters * * * up to the ordinary high water mark *as heretofore or hereafter modified by accretion, erosion, and reliction.*" 43 U.S.C. 1301(a)(1) (emphasis added). And the same rule is effectively mandated for tidal areas, including the marginal sea, by the grant of "lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide," in the present tense, evidently intending, here also, a line

modified from time to time by accretion, erosion and reliction. 43 U.S.C. 1301(a)(2).[4]

There is, moreover, an express exception that proves the rule. The final provision of the definition we have been considering includes "filled in, made, or reclaimed lands which *formerly* were lands beneath navigable waters, as hereinabove defined." 43 U.S.C. 1301(a)(3) (emphasis added). Obviously, this stipulation is redundant if the grant already encompassed all lands submerged at statehood, regardless of intervening geographical changes. In effect, this clause makes clear that deliberate artificial extensions of the mainland will be treated as "avulsive" changes

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[4] Former Solicitor General Cox, in a formal Opinion for the Secretary of the Interior, approved by the Attorney General, explained the meaning of 43 U.S.C. 1301(a)(2) in words we gladly borrow (42 Op. Att'y Gen. 241, 262 (1963)):

> The terms "the line of mean high tide" and "the coast line" connote a boundary line constantly changing as a result of accretion, erosion and reliction. One may fairly ask why Congress did not make this meaning clear in subdivision 2 as it had done in subdivision 1 by speaking of the line "as heretofore or hereafter modified * * *." The answer is twofold. First, the connotation of the phrases "line of mean high tide" and "coast line" was thought too clear to require the additional explanation. Second, the prior words of subdivision 2 did not give rise to the same need for negativing the idea of unvarying limits that might have been supposed to have been created by subdivision 1 if the reference to changes by accretion, erosion and reliction were omitted. Subdivision 1 refers to two dates, one for the purpose of testing navigability and the other, submergence. From this reference it might have been inferred that the line was also fixed as of the latter date. In subdivision 2 no dates, past or present, were necessary; hence there was no comparable inference to dispel.

which, unlike gradual accretion or reliction, do not affect water boundaries.

c. It hardly needs saying that these provisions, defining the present and future scope of the congressional grant, are not subject to expansion at the whim of the affected state. Congress having expressly determined that past and future accretions are excluded, no state can alter that result. Nor can any state unilaterally increase its grant to include some accretions by applying its own narrower definition of that term. Plainly, this federal statute must be read to treat all states alike, defining the limits of the grant in accordance with uniform federal rules. The "ordinary high water mark," the "line of mean high tide," the "line of ordinary low tide," and the "line marking the seaward limit of inland waters" (see 43 U.S.C. 1301(a)(1) and (2), (c)), all have the same meaning in all states, regardless of local property law concepts. Indeed, this Court has so held with respect to the last two terms—the ingredients of the "coast line"—adopting rules of international law for the purpose. *United States* v. *California*, *supra*, 381 U.S. at 163-166, 175-177; *Louisiana Boundary Case*, 394 U.S. 11, 19-35 (1969). It would be absurd to follow a different approach for identifying a high water line, or its ingredients, including accretion.

d. It remains only to note that California here concedes that, as a matter of federal law, the exposure of the formerly submerged lands in dispute, although indirectly attributable to man-made structures, constitutes "accretion" which inures to the upland owner. That is, of course, correct. *County of St. Clair* v. *Lovingston*, *supra*, 90 U.S. (23 Wall.) at 66; *Bonelli Cattle Co.* v. *Arizona*, *supra*, 414 U.S.

at 324, 327. The State accordingly cannot claim the areas in question as "filled in, made or reclaimed lands," terms obviously inapposite to describe the natural and more or less gradual process by which sand accummulated along the shore, albeit the ultimate cause was a jetty affecting the action of the sea.[5]

4. With respect to lands underlying *inland* navigable waters, state title may reach beyond the limits defined in the Submerged Lands Act, because that statute cannot restrict a constitutional grant or reservation at statehood. That is, in effect, the holding of *Corvallis*, which recognizes that a state may, by local law rule, retain once submerged lands that the Submerged Lands Act does not embrace. But no similar result is possible along the open sea. In light of the consistant holdings of this Court since the first *California* case that coastal states held no title to the seabed, the *only* basis for a state claim to lands now or previously underlying the open sea is the Submerged Lands Act of 1953. And, as we have seen, that grant does not encompass former water bottoms which, through accretion, have become attached to the upland.

We need proceed no further since California's whole argument is that "sovereign State lands" do not lose their character as such by "artifically caused" accre-

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[5] We note that the Opinion of former Solicitor General Cox already cited (note 4, *supra*) holds that the term "made" in Section 1301(a)(3) embraces naturally-formed islands—a discrete question not presented here. 42 Op. Att'y Gen. at 241-259, 265-267. At the same time, however, the Opinion firmly rejects the suggestion that accretion to the *mainland*, whether or not indirectly attributable to artificial causes, is included in the Submerged Lands Act grant to the states under this provision. *Id.* at 259-265, 266-267.

tion, and the sovereign title asserted is said to have vested at statehood when the lands were submerged beneath the open sea. That faulty premise defeats the claim as made. Nevertheless, it may be well briefly to address an entirely separate proposition: that California's title rests not on the formerly submerged status of the acreage in dispute, but, rather, upon its present character as upland, "new" land not reserved by the United States in the California Enabling Act and therefore open to disposition by the State in accordance with its own law. That is perhaps the idea underlying the concurring opinion in *Hughes* v. *Washington*, *supra*, 389 U.S. at 295.

This is not an occasion to debate the general question whether state or federal law governs accretions to the mainland along an open coast. For present purposes, it suffices to deal with the claim that a state can appropriate to itself former federal submerged lands which have become attached to uplands at all times in federal ownership. On its face, the proposition is a little startling. But, at all events, we may safely rest on a provision of the Submerged Lands Act which expressly preserves federal title to "all accretions"—presumably past and future—attaching to "lands expressly retained by or ceded to the United States when the State entered the Union", as well as "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." 43 U.S.C. 1313(a).[6] While these are, in terms, exceptions to

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[6] Although "accretions" are expressly mentioned only in connection with federal "acquired lands," it seems obvious the same principle equally applies to "reserved lands" of the United States, also excepted from the grant by Section 5(a) of the Act (43 U.S.C. 1313(a)). Once again, we borrow from

the grant made in 1953, they surely also reflect the authoritative congressional interpretation of the "disclaimer clauses" in the Enabling Acts for the "public land" states as encompassing future accretions to reserved coastal acreage. In the absence of any contrary indication, we must accept this declaration by Congress as dispositive.

5. Finally, we may notice the anomalies and inequities California's submission would produce. For the purpose of measuring its three-mile grant under the Submerged Lands Act, California, like all other states, has started from the present "coastline," which along the open coast is the low water line as extended seaward by accretion or reliction, whether

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former Solicitor General Cox's Opinion (42 Op. Att'y Gen. at 264):

> There can be no doubt that Congress intended each of the various categories of lands excepted by section 5(a) to include accretions. The terms of section 5(a) make this clear. The customary rights of landowners are set forth in full in the first of the several exceptions listed in section 5(a). Thus, it speaks of "all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon * * *." Each of the other exceptions speaks simply of "all lands." Obviously, the more comprehensive word "lands" was used instead of "tracts or parcels of land" and the explicit reference to accretions, resources and improvements was omitted in order to avoid repetition. There is no reasonable basis for any other conclusion. Congress would not have limited its exceptions of "all accretions thereto, resources therein, or improvements thereon" to lands "lawfully and expressly acquired by the United States" from any State or its grantees and then denied them where the lands were "expressly retained" or "acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity * * *."

due to natural or artificial causes, and even directly by jetties or other coast protective works. *United States* v. *California*, *supra*, 381 U.S. at 176-177; 382 U.S. 448, 449 (1966) (Supplemental Decree); 432 U.S. 40, 41-42 (1977) (Second Supplemental Decree). See, also, *Louisiana Boundary Case*, *supra*, 394 U.S. at 40-41 n.48, 48-49 n.64; *United States* v. *California*, 447 U.S. 1, 5-8 (1980). Yet, the State also claims to retain the formerly submerged acreage on the landward side. And, while insisting on keeping lands emerging from the seabed due to artificially caused accretion or reliction, California, so far it appears, does not forego new seabed formed by erosion attributable to like causes. That is, indeed, attempting to have one's cake and eat it too.

What is more, the results of the State's argument are incongruous and impractical. A uniform federal rule would be applied in fixing the low water line, which follows the shifting actuality regardless of cause, and, at the same time, varying state law rules must be adopted in setting the high water line along the same coast, including a rule that departs from current reality when geographical changes are indirectly traceable to man-made construction. As we have noted, this Court has determined that the "coastline" relevant for purposes of the Submerged Lands Act is the baseline recognized in international law, which is ambulatory, following geographical realities regardless of cause, and which, along the open coast, is marked on current nautical charts. That is, of course, a practical standard. But the virtue of that relatively simple rule would be defeated if it were necessary also, in every case, to plot the historic line of mean high water or the fictional high water line that unaided nature might have created. In the pres-

ent instance, such a reconstruction may be possible. In others, however, the task simply would not be feasible, or would burden the courts—including this Court—with endless litigation. One need only contemplate the varying contentions that would confront us if we had to redraw the Louisiana coast discounting the effect of coast protective works, jetties, landfill, channel dredging and all other human activities that have indirectly changed the shoreline.

There are complexities enough in this matter without inventing others. Especially so when the obvious solution works no injustice to the coastal states. Whenever the United States, in the exercise of the federal navigational servitude, builds jetties or other works along the coast, it is presumptively directly *benefiting* the state affected, as well as the Nation as a whole. Sometimes, to be sure, an incidental consequence (after 1953) is to deprive the state of some submerged acreage. But that is normally compensated under the Submerged Lands Act by pushing outward the boundary of the three-mile belt, usually creating a "bulge" of new state seabed larger than the acreage lost adjacent to the shore.[7] In some cases, moreover, the consequence is to create a new pocket of inland waters, which gives the state both a fuller title near shore and a more seaward baseline from which to measure its three-mile belt of territorial sea. Plainly, there is no inequity involved.

6. In sum, insofar as we are concerned with formerly submerged land, the present case does not

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[7] Thus, for instance, a mile-long jetty, fifty feet wide, jutting out at right angles from a straight coast "appropriates" less than six acres of submerged land but produces a "bulge" of additional state territorial seabed comprising some 2,600 acres.

require resolution of the continuing viability of *Hughes* v. *Washington*, *supra*, or even the question suggested by *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), whether to adopt state law as the federal rule when the United States is the upland landowner. At the time the acreage in dispute was submerged, it was federal property and it so remained when it emerged and became attached to adjoining land of the United States. The Submerged Lands Act came too late to convey title to California and there is no other basis for a State claim. It is of no concern to California whether the accreted lands should be viewed as a distinct parcel of the public domain or whether a formal "withdrawal" is necessary to subject the area to Coast Guard jurisdiction. In no event does the State itself have any proprietary claim there.

B. The Former Tidelands

A relatively small portion of the parcel in dispute apparently covers what were, at statehood, tidelands —the "foreshore" of the sea, uncovered at low tide but submerged at high tide. Although most of what has been said with respect to the former submerged lands is equally applicable here, the status of the former tidelands calls for some additional comments.

1. It has been assumed that the Equal Footing Doctrine, of its own force, vested in each of the coastal states, upon its admission to the Union, title to all tidelands, even on the open coast. If that is correct, the question arises whether these once "sovereign" state lands—unlike the submerged acreage which California did not obtain at statehood—remain in state ownership notwithstanding they are no longer tidelands. That issue is suggested by the hold-

ing of *Corvallis* that the Equal Footing Doctrine irrevocably vests affected acreage, subject only to state law acceptance of the principles of accretion and reliction. In sum, the question is whether the *Corvallis* rule is applicable to tidelands bordering the open sea.

2. We stress, at the outset, that the Court is not committed to the proposition that the Equal Footing Doctrine has any application to tidelands along the open sea. So far as we are aware, this Court has never had occasion squarely to resolve the question.[8] To be sure, the opinion in *United States* v. *California*, *supra*, 332 U.S. at 30, recites with apparent approval the concession of the United States that "under the *Pollard* rule, as explained in later cases, California has a qualified ownership of lands under inland navigable waters such as rivers, harbors, and *even tidelands down to the low water mark*" (emphasis added; footnotes omitted).[9] So, also, the Decree in that case, following our proposal, does not embrace

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[8] The familiar precedents in this Court expressly confirming state title to tidelands have all involved what would today be viewed as *inland* waters, whether in bays (*Pollard's Lessee* v. *Hagan*, *supra*), river mouths (*Shively* v. *Bowlby*, 152 U.S. 1 (1894)), or harbors (*Borax Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935)). The reference to the State as owner of the ocean-front "tideland" in *Hughes* v. *Washington*, *supra*, 389 U.S. at 294 & n.3, is no exception, since, by that time, the Submerged Lands Act had established State title there.

[9] Even that statement is ambiguous: on its face, it could be restricted to tidelands appurtenant to *inland* tidal waters, such as bays, harbors and estuaries, not including the foreshore of the open sea. There is no denying, however, that, at the time, the United States was conceding state ownership of *all* tidelands—witness the decrees proposed and entered in this case and its sequels.

tidelands. 332 U.S. 804-805 (1947). Nor do the like Decrees entered in *United States* v. *Louisiana*, 340 U.S. 899 (1950), and *United States* v. *Texas*, 340 U.S. 900 (1950). But this hardly reflects a firm adjudication of the matter after plenary consideration.

Fortunately, it is no longer necessary to debate the question.[10] For, even if the Court be taken to have ruled that ocean-front tidelands were subject to the *Pollard* rule, it is perfectly clear that, in this context at least, the Equal Footing principle was understood to vest only an *ambulatory* title, shifting as accretion, reliction or erosion defined and redefined the foreshore from time to time. As we have already noted (*supra* pages 11-12), that was then the prevailing view of the *Pollard* doctrine as it applied to all navigable waters. But, in this instance, the opinions and decrees in the first *California*, *Louisiana*, and *Texas* cases, as well as the more recent decisions in the same cases, explicitly implement that understanding.

Indeed, it is obvious that the Court, in confirming the federal claim in submerged lands underlying the Pacific Ocean or the Gulf of Mexico "seaward of the

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[10] There was, of course, less reason to concede state ownership of the foreshore along the open sea. Normally, the banks or shore belong to the owner of the bed: the state in the case of inland navigable waters, the upland proprietor when the water body is not navigable. Thus, under the ruling of the first *California* case that the seabed appertained to the Nation, rather than the states, the adjoining tidelands arguably were likewise within the federal domain—all the more so when the United States was also the upland proprietor. To be sure, the equation changed when Congress relinquished the marginal seabed to the states; it was then entirely consistent to include the foreshore as well.

ordinary low-water mark on the coast" of the respective states (332 U.S. at 805; 340 U.S. at 899, 900), intended an actual reality, not a reconstruction of the historic statehood coastline. Any other reading would be wholly inconsistent with the rationale of the decisions, recognizing the paramount federal interest in the marginal sea as a current geographical fact. Yet, undoubtedly in some places—especially along the fickle Louisiana coast—areas that were once tidelands were now wholly submerged and thus adjudicated to the United States as "seaward of the ordinary low-water mark." So, also, we must assume, former tidelands assimilated to the mainland by accretion would cease to be state lands, although in either case, new tidelands typically would form and inure to the state, whether shoreward or seaward of the historic line.

This equitable and workable regime, as we have seen, was adopted in the Submerged Lands Act which relinquished (or confirmed) to the states title to coastal tidelands, subject to changes in physical geography. 43 U.S.C. 1301(a)(2) and 1311(a). And, since the enactment of that statute, this Court consistently has measured the additional three-mile belt of marginal seabed granted to the States from the current low water line. In these circumstances, it would be wholly inappropriate to apply the *Corvallis* rule retroactively to former tidelands along the open sea.

3. At all events, *Corvallis* is inapplicable here since, ultimately, the issue is the water boundary of uplands which have never left federal ownership. Under *Wilson* v. *Omaha Indian Tribe*, *supra*, that is an issue to be resolved by applying the law of the United States. 442 U.S. at 669-671. States law rules,

it is true, may be "borrowed" in appropriate circumstances. *Id.* at 671-676. But this is plainly not such a case.

Here, the question is not whether to prefer general local property law over a federal "common law" rule devised for the discrete purpose of resolving interstate boundary controveries. With respect to tidelands along the seacoast, Congress has enacted a specific solution which ought to govern uniformly. There are, moreover, adequate reasons for differentiating the law applicable to the edge of the open sea. See *Hughes* v. *Washington, supra*, 389 U.S. at 293.

Nor are there, in our situation, any opposing considerations. Indeed, it can make no sense to defer to a state law rule which freezes the status of former tidelands because the geographical change resulted indirectly from man-made construction, even though the land on both sides remains in the United States. To concede a narrow strip of state lands dividing a federal reservation in these circumstances is a result to be eschewed if at all possible. In our view, this is plainly one of those situations in which there is a "need for a uniform national rule" to protect "federal trust responsibilities," and no countervailing substantial state interest on behalf of other affected landowners. 442 U.S. at 673-674. On the contrary, here there is every reason to subject the former submerged lands and the adjoining former tidelands to the same legal regime. Both must be governed by the federal rule if the tail is not to be permitted to wag the dog.

CONCLUSION

The Motion of the United States should be granted, the Motion of California denied, and judgment entered quieting the title of the United States to the lands described in the Complaint.

Respectfully submitted.

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